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COURT OF CRIMINAL APPEALS
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No. PD-0034-21

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/8/2021
DEANA WILLIAMSON, CLERK

CORNELL WITCHER, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Bowie County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Cornell Witcher.

*The case was tried before the Honorable John L. Tidwell, Presiding Judge, 202nd District Court, Bowie County, Texas.

*Counsel for Appellant in the trial court were Clayton Haas and Amanda Gunn, Bowie County Public Defender's Office, 424 West Broad Street, Texarkana, Texas 75501.

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* * * * *

STATE'S BRIEF ON THE MERITS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Jurors decide the weight and credibility of evidence because they are fact-finders. That role includes deciding what testimony means based on context and a shared language. Equating this process to speculation misses the point of the jury system.

STATEMENT OF THE CASE

Appellant was convicted of continuous sexual abuse. The court of appeals reversed on the insufficiency of the evidence of the only element challenged: the date the period of sexual abuse began.[1]

[1] *Witcher v. State*, No. 06-20-00040-CR, 2020 WL 7483953, at *4-5 (Tex. App.—Texarkana Dec. 21, 2020, pet. granted) (not designated for publication).

STATEMENT REGARDING ORAL ARGUMENT

The State did not request oral argument.

ISSUE PRESENTED

The court of appeals ignored important evidence and substituted its interpretation of the victim's testimony for the jury's.

STATEMENT OF FACTS[2]

The testimony

Mary, the victim, testified. She turned 10 years old during the period of sexual abuse and was 11 at trial.[3] At the time of the offense, Mary lived with her mother, her mother's boyfriend, her four-year-old brother, her older brother Darren, and appellant, an acquaintance of the family.[4] She agreed that Darren went to jail "at some point" and that is "when" appellant started the abuse; he would come into the room when her mother was at work.[5] There were three exchanges directly on point:

> Q: Okay. So when -- when [Darren] moved out and [appellant] was still staying at the house, did he start doing things to you that were not right?
> A: Yes.[6]
> . . .

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[2] This recitation is limited to portions of the record relevant to the narrow issue presented. The victim and her family are referred to using the same pseudonyms used by the court of appeals.

[3] 19 RR 79.

[4] 19 RR 17-19, 30.

[5] 19 RR 80-82. Her mother helped deliver newspapers. 19 RR 104.

[6] 19 RR 81.

Q: When did he start coming into the room and doing those things to you?
A: When my brother went to jail.[7]
. . .
Q: So, [Mary], just to be clear, he started coming in your room when [Darren] went to jail; is that right?
A: Yes.[8]

Mary also said when it stopped:

Q: And what made him stop? When did he stop coming in and doing those things to you? Was it after you told?
A: Yes.[9]

Mary was not cross-examined.

Two witnesses' testimony informed the date of Darren's arrest and its significance. Mary's sister Erin agreed that it was "maybe June 10, give or take."[10] But Erin also explained that, during the period of June 10 through July 28, Mary always wanted to leave her mother's house and come to Erin's house.[11] Mary asked over and over, and at one point begged.[12] The lead investigator, Dustin Thompson,[13] was more explicit. He agreed with the prosecutor's recapitulation that the

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[7] 19 RR 84.

[8] 19 RR 86.

[9] 19 RR 85.

[10] 19 RR 18.

[11] 19 RR 20-21.

[12] 19 RR 21-22.

[13] 19 RR 87-88.

testimony—implicitly Mary's—showed "the abuse started in June when [Darren] went to jail."[14] He agreed that Darren went to jail "around th[e] time" the prosecutor referred to moments prior, "June 10th, 2018 through July 28th, 2018."[15] Based on Mary's testimony and uncontested evidence that the last act of abuse occurred on July 26,[16] Thompson agreed the period at issue was 30 days or more in duration.[17] The prosecutor summed this up again later in Thompson's testimony, explaining how the dates alleged in the indictment were chosen:

> Q: Okay. Those dates, when [Darren] went to jail, the June 10th, 2018 through July 28th, when they confronted him, 2018, those are the dates as close as possible that you could get to confirm by [Mary] and the other evidence in the case?
> A: Correct.[18]

Mary's ability to communicate.

It may not be clear from her testimony, but Mary is somewhat developmentally delayed. The nurse practitioner who first saw Mary testified as such and had noted

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[14] 19 RR 89.

[15] 19 RR 89.

[16] Mary told the nurse practitioner on July 28 that appellant "'did it' the 'night before last night.'" State's Ex. 1 (20 RR PDF 6).

[17] 19 RR 90. The question used July 28, as alleged in the indictment.

[18] 19 RR 106.

it in her report.[19] Mary takes special classes at school.[20] Jessica Kelly, a forensic interviewer with the Texarkana Children's Advocacy Center, has specialized training in interviewing children with developmental delays and offered a more detailed assessment.[21] She interviewed Mary on July 30, 2018.[22] She agreed that Mary "may be a little mentally delayed."[23] Kelly thus tailored her questions to the level of "maybe a 5- or 6-year-old," and was not surprised Mary could not recall the exact number of times she was abused.[24]

None of this appeared to hinder Mary's ability to relate her experience. Taking Mary's development into account, Kelly said her responses were age appropriate and presented the discernible details, consistency, and use of child-like language one would expect of someone who was not coached.[25] Others who interacted with Mary agreed. According to the nurse practitioner, Mary "speaks very well," "gave a well-stated history," and had no trouble understanding or communicating with her.[26]

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[19] 19 RR 40-41; State's Ex. 1 (20 RR PDF 6).

[20] 19 RR 33.

[21] 19 RR 122-23.

[22] 19 RR 128.

[23] 19 RR 134.

[24] 19 RR 136.

[25] 19 RR 138-39.

[26] 19 RR 41, 45-46.

Investigator Thompson had no doubt about Mary's ability to communicate effectively.[27]

Other evidence of everyone's understanding of the facts.

The amended indictment specified a date range for the abuse: June 10, 2018, through July 28, 2018.[28] It did not state this range originally.[29] The motion did not explain why the amendment was requested.[30]

After *voir dire* but before trial, an "outcry" hearing was held.[31] When the outcry witness asked Mary how many times appellant committed the conduct at issue, Mary said, "he's been doing it since my little brother went to jail."[32]

The defense opened by explaining its "reasonable doubt" defense based on the lack of evidence tying appellant "to this crime."[33] After the State rested, defense counsel made a perfunctory motion for directed verdict.[34] The trial court denied the

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[27] 19 RR 103.

[28] 1 CR 42 (amended indictment).

[29] 1 CR 19 (alleging period between July 18, 2016, to July 28, 2018).

[30] 1 CR 35.

[31] 18 RR *et seq*. *See* TEX. CODE CRIM. PROC. art. 38.072 § 2(b)(2) (requiring "a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement.").

[32] 18 RR 11. It is not clear who misspoke by saying "little," as Mary's little brother was four and the witness made it clear the reference was to Mary's older brother, Darren. 18 RR 11.

[33] 19 RR 15.

[34] 19 RR 150.

motion, having checked the "duration" element off its list during trial.[35] A motion for new trial was filed by a third defense attorney; it alleged, without elaboration, that "the verdict is contrary to the law and the evidence."[36]

SUMMARY OF THE ARGUMENT

The court of appeals ignored material evidence about when appellant began sexually abusing Mary. Acknowledging this evidence likely would not have changed its analysis, however, because that court failed to respect the jury's responsibility to find facts and resolve conflicts or doubts. When there is some conceivable doubt as to what a witness meant, the only role a court has to play is to determine whether no rational jury could have resolved it in favor of conviction. This respect for the jury's authority is evident not only in sufficiency review but in other contexts like jury charges and expert testimony. Applied to this case, a rational jury could have found beyond a reasonable doubt that the sexual abuse started when Mary's brother went to jail on June 10, 2018. This is not "speculation." It is proper deference to the jury's role as fact-finder.

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[35] 19 RR 50.

[36] 1 CR 98.

ARGUMENT

Appellant never disputed that Mary was repeatedly sexually abused. On appeal, he did not dispute the evidence showing he did it. There is no dispute that it stopped when Mary found the courage to tell her sister despite the threats appellant made against her mother and her little brother.[37] The only fact in dispute is when the abuse started. This dispute is manufactured.

For perspective, if nothing else, the record makes it clear that no one perceived any fact problem until appeal. Looking backwards from trial, it appears the indictment was amended to conform with the anticipated testimony. Even assuming a complete lack of pretrial discovery, the outcry hearing let everyone know Darren's arrest was the starting point. The State's investigator and the trial court both understood the testimony to satisfy the "duration" element. And while it is not surprising, given the defense strategy, that no one challenged the duration of sexual abuse in front of the jury, one would expect either the motion for directed verdict or motion for new trial to raise such a glaring legal issue. In short, everyone thought the evidence was what it appears to be. Legal analysis shows everyone was right.

I. What the court of appeals did.

There is no real debate about the date Darren went to jail. Investigator Thompson affirmed that June 10 was the date his investigation revealed, and Mary's

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[37] 19 RR 24.

desperate urge to escape the house starting June 10 tied the testimony together. The court of appeals simply cherry-picked testimony of rough estimates and loose language.[38] Its failure to consider all the evidence was plainly error.

That error did not ultimately affect the outcome, however, because the court spent most of its time pondering the meaning of Mary's testimony. It should not have. Mary did not say the abuse started *after* Darren went to jail, or did not start *until* he went to jail, or that it occurred *during a period in which* he was in jail. She said it started *when* he went to jail. She said it repeatedly. As evinced by her agreement that the abuse ended "after [she] told," she apparently understood the difference between something occurring *when* another thing happens and something occurring *after* another thing happens. Mary was able to communicate effectively with law enforcement, medical personnel, and a forensic interviewer. There is no reason to think she could not communicate effectively with the jury.

Despite admitting the term "when" could refer to a specific time, the court of appeals insisted it could also have other meanings.[39] It concluded that Mary's testimony "equally supports" what the jury apparently understood and something else, making conviction impossible without "speculation."[40]

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[38] *Witcher*, 2020 WL 7483953, at *4.

[39] *Id*.

[40] *Id*.

II. This isn't a "speculation" case.

The style case for speculation, *Hooper v. State*,[41] formed the centerpiece of the court of appeals's argument.[42] *Hooper* is the go-to case when a party or court thinks there is insufficient evidence of an element. *Hooper* did not apply the speculation-versus-inference dichotomy but is quoted for its hypothetical in which a jury randomly convicts one of many people with smoking guns for killing a victim with a single gunshot wound.[43] In practice, few cases that cite *Hooper* are so extreme. For example, this Court invoked *Hooper* in *Metcalf v. State* when it rejected the rationality of inferring intent to promote sexual assault of one's daughter from the provision of a whistle, cell phone, and beaded curtain,[44] and in *Rabb v. State* when a jury had to assume that swallowing a baggie of drugs destroyed it rather than temporarily concealed it.[45] In each case, there was simply insufficient evidence to support the conclusion even if the assumption was reasonable.

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41 214 S.W.3d 9 (Tex. Crim. App. 2007).

42 *Witcher*, 2020 WL 7483953, at *3-4.

43 *Hooper*, 214 S.W.3d at 16.

44 597 S.W.3d 847, 860 (Tex. Crim. App. 2020).

45 434 S.W.3d 613, 617 (Tex. Crim. App. 2014) (holding State to prove the statutory manner of tampering alleged). A less typical invocation of *Hooper* occurred in *Griffith v. State*, an unpublished case from this Court in which the duration of sexual abuse was at issue. No. PD-0639-18, 2019 WL 1486926, at *2 (Tex. Crim. App. Apr. 3, 2019) (not designated for publication). In that case, the record showed a plausible timeline of sexual abuse that was presented pretrial but not at trial. *Id*. at *5. That was more of a no-evidence problem; "A jury cannot make inferences based on evidence that they never heard." *Id*.

This case is different. There is no gap in the evidence, no extrapolation. As the court of appeals conceded, once the date of Darren's arrest is ascertained, Mary's testimony alone could settle the matter. The question is who gets to decide whether it did?

III. Any way this is sliced, it comes down to the jury's core function.

There are a number of ways of looking at what happened in this case. Ultimately, each one returns to the idea that it is the jury who decides what the evidence is, what the testimony meant, and whether it harbored insurmountable doubts about any of it. The only thing a reviewing court can do is determine if the jury was irrational. Nothing about the verdict in this case was irrational.

A. Juries determine testimony.

Our system charges jurors with deliberating over the evidence and deciding whether a defendant is guilty. This is required by constitution [46] and by statute.[47] Articles 36.13 and 38.04 affirm by title and substance that juries are the judges of the facts. There is no real dispute about these principles; words and phrases like "light

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[46] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."); TEX. CONST. Art. I, § 15 ("The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.").

[47] TEX. CODE CRIM. PROC. arts. 36.13 ("Unless otherwise provided in this Code, the jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby."); 38.04 ("The jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony, except where it is provided by law that proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or where the law directs that a certain degree of weight is to be attached to a certain species of evidence.").

most favorable," "deference," and "sole judge of credibility and weight" appear in every boiler-plate recitation of sufficiency law, as they did in the opinion below.[48] Although courts often focus on the jury's prerogative to determine weight and credibility, those are merely facets of its role as the finder of fact.[49] Any standard of review that does not defer to the jury's findings of fact—bounded only by the limits of rationality—would violate the defendant's right to a trial by a jury of his peers.[50] It is a role this Court takes seriously; the refusal to tolerate appellate courts sitting as thirteenth jurors is what plagued and ultimately doomed this Court's experiment with factual sufficiency review.[51]

The meaning of a witness's statement is nothing if not a fact. As such, it is a question reserved for the jury regardless of whether it is phrased in these terms.[52]

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[48] *Witcher*, 2020 WL 7483953, at *1.

[49] *Metcalf*, 597 S.W.3d at 865 ("The jury, *as the fact finder*, is the sole judge of the weight of the evidence and the credibility of the witnesses.") (emphasis added).

[50] *Brooks v. State*, 323 S.W.3d 893, 905 (Tex. Crim. App. 2010) (plurality).

[51] *See Watson v. State*, 204 S.W.3d 404, 416 (Tex. Crim. App. 2006) (calling the holding of its prior factual sufficiency "problematic . . . because it smacks of an appellate court simply opting to 'disagree' with the jury's verdict—something we have never before tolerated even in the 'factual sufficiency' context."); *Brooks*, 323 S.W.3d at 902 (plurality) (recognizing that a factual sufficiency review that properly respects the jury's role as the sole judge of credibility and weight is indistinguishable from legal sufficiency review).

[52] *Compare Kenny v. State*, 292 S.W.3d 89, 99 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (in kidnaping case, whether torture threat was meant to be taken literally "goes to the weight and credibility of the evidence"), *with Lebleu v. State*, 192 S.W.3d 205, 211 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (evidence "that appellant's words could have carried any number of meanings" in a retaliation case merely presented competing theories the jury's role it was to (continued...)

What Mary meant when she repeatedly said "when" must be a decision reserved for the jury.

B. Respect for the jury's ability to understand language is common in criminal law.

Review of implicit fact-findings is not the only context in which the jury's role in fact-finding is esteemed.

In jury-charge cases, this Court consistently permits the jury to assign undefined statutory terms "any meaning which is acceptable in common parlance" unless they have (or have acquired) a legal meaning.[53] When the "terms used are words simple in themselves and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms."[54] So crucial is the jury's role that this practice persists even when those terms have an understood meaning for sufficiency review and their interpretation makes or breaks the case.[55] Simply put,

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[52](...continued)
evaluate). This is also the case with libel and slander. *See Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000) (judge determines only whether a publication is capable of a defamatory meaning; any ambiguity in its meaning requires that the jury determine what effect the language would have on the mind of the ordinary reader).

[53] *See Medford v. State*, 13 S.W.3d 769, 771-72 (Tex. Crim. App. 2000); *Kirsch v. State*, 357 S.W.3d 645, 650-52 (Tex. Crim. App. 2012).

[54] *Russell v. State*, 665 S.W.2d 771, 780 (Tex. Crim. App. 1983).

[55] *See Kirsch*, 357 S.W.3d at 650-52 ("operate" in DWI); *Green v. State*, 476 S.W.3d 440, 445 (Tex. Crim. App. 2015) ("penetration," and "female sexual organ" in aggravated sexual assault). *Contrast Celis v. State*, 416 S.W.3d 419, 433 (Tex. Crim. App. 2013) (plurality) ("The term 'in good standing' is a technical term because it has 'acquired a peculiar and appropriate meaning in the law' and may not be construed according to the traditional rules of grammar and common usage.").

allowing the trial court to define such terms interferes with the jury's responsibility to resolve questions of fact.[56]

The same considerations are applied when defining the elements of an offense for sufficiency review. This Court routinely assumes juries are up to the task of understanding important words and phrases so long as they have not acquired technical meanings.[57]

The admissibility of expert testimony on language is decided along the same lines. Judges are not permitted to allow experts to opine on matters within the common knowledge of ordinary jurors because that opinion would be, by definition, "unhelpful and therefore superfluous and a waste of time."[58] Courts have applied this to testimony about words, most often with gang or drug slang.[59] In that context, an

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[56] *Kirsch*, 357 S.W.3d at 652.

[57] *State v. Bolles*, 541 S.W.3d 128, 138 (Tex. Crim. App. 2017) (interpreting TEX. PENAL CODE § 43.26(a), possession of child pornography, and concluding, "Phrases such as 'engaging in,' 'sexual activity,' and 'lewd exhibition' are terms that lay people are perfectly capable of understanding."). *Contrast Medford*, 13 S.W.3d at 772 ("'Arrest' is a technical term possessing a long, established history in the common law, and it would be inappropriate if jurors arbitrarily applied their personal definitions of arrest.").

[58] *Pierce v. State*, 777 S.W.2d 399, 414 (Tex. Crim. App. 1989) (quoting the official comment to FED. R. EVID. 702). *See* TEX. R. EVID. 702 ("A witness who is qualified as an expert . . . may testify in the form of an opinion or otherwise if the expert's . . . specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."). *See*, *e.g.*, *Pierce*, 777 S.W.2d at 414 (upholding exclusion of expert opinion on visual perspective); *Williams v. State*, 895 S.W.2d 363, 366 (Tex. Crim. App. 1994) ("[T]hat appellant was basically a moral person[] was not outside the knowledge and experience of the average juror.").

[59] *United States v. Vera*, 770 F.3d 1232, 1241 (9th Cir. 2014) ("Drug jargon is well established as an appropriate subject for expert testimony and investigating officers may testify as drug jargon (continued...)

expert's testimony is helpful (and admissible) when it gives testimony meaning that a layperson might not grasp.[60] But it is unhelpful (and inadmissible) when it merely defines common words like "what," "she," "that," and "stuff," the meanings of which are all "well within the province of the jury to interpret."[61]

The thread that runs through these bodies of law is that jurors are responsible for determining what words mean if it is within their ability to grasp. There is no serious argument that "when" has acquired a technical definition such that a jury cannot assign it any meaning acceptable in common parlance. The jury should have been permitted to assign Mary's use of "when" the meaning the court of appeals concedes is permissible.

C. If there was any doubt, it was the jury's job to wrestle with it.

In light of the fact that "when" can, and usually does, mean "when," the court of appeals's real complaint with the evidence appears to be that there was not *better*

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[59](...continued)
experts who interpret the meaning of code words used in recorded calls."); *United States v. Delpit*, 94 F.3d 1134, 1145 (8th Cir. 1996) ("It is well established that experts may help the jury with the meaning of [drug dealer] jargon and codewords."). This has also been a consideration when excusing a witness from "The Rule." *See Hullaby v. State*, 911 S.W.2d 921, 929 (Tex. App.—Fort Worth 1995, pet. ref'd) (upholding ruling that a police witness could remain in the courtroom "to hear and interpret the meaning of 'gang' slang and symbolism; it being apparent that some such slang and symbolic gestures/signs do not have a meaning that is readily discernable by the uninitiated.").

[60] *See*, *e.g.*, *Stevenson v. State*, 963 S.W.2d 801, 804 (Tex. App.—Fort Worth 1998, pet. ref'd) (officer explaining that the phrase "What's up, cuz?" is positive when one Crip says it to another Crip but means "I'm going to kill you" when said to an enemy; the purpose of the latter is "to see the person's expression right before the gang member shoots and kills the person.").

[61] *United States v. Haines*, 803 F.3d 713, 734 (5th Cir. 2015).

evidence of when the abuse started. That is, Mary did not say, "It started the night Darren went to jail," or "It started one or two days later," and there was no official paperwork showing the date of arrest. Could the testimony have been more precise on this point? Sure. That is often the case, especially with children's inability to describe the details surrounding continuous sexual abuse.[62] But this lack of precision could do no more than create some doubt as to what Mary meant when she repeatedly said the abuse started "when" Darren went to jail. If there is a meaningful distinction between deciding what a witness means and resolving doubt over the same, it is the still the jury's job to do it. And it is still the role of an appellate court to view the evidence in the light most favorable to the verdict and determine only whether no rational juror could have come to the conclusion the jury apparently did. Framed this way, it was rational for the jury to conclude Mary meant "when" when she said "when."

IV. Conclusion

When one diner says to another, "Salt, please," the other diner knows what is meant even though "salt" could theoretically refer to any electrically neutral

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[62] That was one of the reasons Judge Cochran suggested the change in law that became Section 21.02. *Dixon v. State*, 201 S.W.3d 731, 736-37 (Tex. Crim. App. 2006) (Cochran, J., concurring) (summarizing the "depressingly familiar" facts attendant repeated molestation, including a child "too young to be able to differentiate one instance of sexual exposure, contact, or penetration from another or have an understanding of arithmetic sufficient to accurately indicate the number of offenses.").

combination of cations and anions,[63] Strategic Arms Limitation Talks, or a spy-thriller starring Angelina Jolie.[64] The other diner is so confident that he would never ask a clarifying question. In sufficiency parlance, the other diner has (consciously or not) determined from context that whatever conceivable doubt he has is not a reasonable one. No one can say that is irrational. The same analysis applies here.

In the light most favorable to the verdict, the jury believed Thompson ascertained an arrest date of June 10 without having to see a book-in form, and understood Mary's plain testimony without any follow-up questions. Its understanding and resulting verdict were not irrational. Whatever imprecision exists and whatever doubt the court of appeals has are irrelevant. This is not because the witness was a child or the victim of sexual abuse but because jurors decide what all witnesses mean, especially when those witnesses use common language.

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[63] https://en.wikipedia.org/wiki/Salt_(chemistry) ("Salts are composed of related numbers of cations (positively charged ions) and anions (negatively charged ions) so that the product is electrically neutral (without a net charge).") (last checked 4/2/21).

[64] SALT (2010 Sony Pictures Entertainment).

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and affirm appellant's conviction for continuous sexual abuse.

Respectfully submitted,

/s/ John R. Messinger

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/s/ John R. Messinger
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